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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2064

In the Matter of
THOMAS DI BELLA,

A Witness Before A Special May, 1974 Grand Jury
In the Eastern District of New York

THOMAS DI BELLA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Thomas Di Bella prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on July 3, 1974, which affirmed a judgment of civil contempt previously entered against the petitioner in the United States District Court for the Eastern District of New York.

Opinion Below

The Court of Appeals affirmed in an opinion dated July 3, 1974, *Matter of DiBella*, — F.2d —. The opinion of the Court of Appeals is reproduced as Appendix A, hereto, *infra* (1a, *et seq.*).*

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on July 3, 1974.

Questions Presented for Review

18 U.S.C. § 6003 sets forth the procedure by which use immunity may be conferred upon an individual who, on the basis of his privilege against self incrimination, refuses to testify before a court or grand jury of the United States. 28 C.F.R. § 0.175 is the Regulation of the Department of Justice implementing the grant of authority set forth in 18 U.S.C. § 6003. In the present case, an attorney attached to a so-called Federal Strike Force unit applied to the assistant Attorney General in charge of the criminal division of the Department of Justice for permission to seek an order granting immunity to Petitioner and compelling Petitioner to testify before a Federal Grand Jury in the Eastern District of New York. The United States Attorney for the District did not participate in, authorize or have knowledge of the application to the Assistant Attorney General.

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*In this petition, "—a" is a reference to the appendices annexed to this petition. Appendix A is the opinion of the Court of Appeals. Appendix B contains the constitutional, statutory and regulatory provisions involved.

References to the reporter's minutes of proceedings in the District Court, as filed in the Court of Appeals, are preceded by "Tr."

The following questions are presented for review:

1. Is it violative of the Congressional intent, as expressed in 18 U.S.C. § 6003(b) and as indicated by the legislative history of the statute, for an attorney, attached to a Strike Force unit, to apply directly to an Assistant Attorney General, without first bringing the matter to the attention of the United States Attorney and securing his sponsorship and approval of the application?

2. Was the procedure followed herein also violative of the regulations promulgated by the Attorney General for the approval of immunity applications (28 C.F.R. § 0.175)?

Constitutional, Statutory and Regulatory Provisions Involved

The case involves the following constitutional, statutory and regulatory provisions, all of which are reproduced in Appendix B to this petition:

Constitution:

Due Process and Self-Incrimination clauses of the Fifth Amendment (8a).

United States Code:

18 U.S.C. § 6002 [Immunity of Witnesses: Immunity Generally] (7a-8a).

18 U.S.C. § 6003 [Same: Court and Grand Jury Proceedings] (8a).

18 U.S.C. § 6004 [Same: Certain Administrative Proceedings] (8a-9a).

28 U.S.C. § 510 [The Attorney General: Delegation of Authority] (9a).

28 U.S.C. § 515 [Same: Authority for Legal Proceedings; Commission, Oath, and Salary for Special Attorneys] (9a-10a).

Code of Federal Regulations:

28 C.F.R. § 0.175 [Assigning Responsibility Concerning Applications for Orders Compelling Testimony or Production of Evidence by Witnesses: Judicial and Administrative Proceedings] (10a-11a).

28 C.F.R. § 0.55 [Criminal Division: General Functions] (11a).

28 C.F.R. § 0.60 [Same: Designation of Attorneys to Present Evidence to Grand Juries] (12a).

Statement of the Case

A. Proceedings Leading to the Finding of Contempt

The underlying facts are not in dispute and are set forth in the opinion of the Court of Appeals as follows:

> "* * * In May, 1974, a Special Attorney attached to the Brooklyn Strike Force applied to the Department of Justice for authorization to seek an immunity order regarding appellant DiBella in his appearance before a Special Grand Jury in the Eastern District of New York. This body was empanelled to investigate racketeering—in particular, illegal gambling and loan sharking and related activities. A designated Assistant Attorney General approved the request [by letter dated May 28, 1974]. Thereafter [on June 10, 1974], the Special Attorney applied to the United States District Court for the Eastern District of New York for an order granting immunity to DiBella under 18 U.S.C. §§ 6002-03, reproduced in the margin. [See Appendix B hereto, at pp. 7a-8a]. In the course of the hearing on the application, the United States Attorney for the Eastern District

personally appeared and signed the application for an immunity order [*]. Chief Judge Mishler then granted the immunity order. Nevertheless, DiBella refused to answer questions put to him, despite the court's order to do so. The judge thereafter held DiBella in civil contempt, and sentenced him to a term of six months or the life of the Grand Jury, whichever proved to be shorter, or until such earlier date as he chose to purge himself by complying with the order to testify. Execution of the sentence was stayed, and the matter is before us on an expedited appeal from the judgment of contempt."

B. The Status and Powers of the Special Attorney

The Court of Appeals in its opinion, and we in this petition, refer to the attorney in question as the "Special Attorney", because that is what he calls himself. It was

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*The abbreviated summary of events contained in the opinion of the Court of Appeals, departs from the facts to the following extent: On June 10, 1974, the Special Attorney applied to Chief Judge Mishler for an order granting immunity, and the order was issued. Later in the day, petitioner appeared before the Grand Jury and refused to testify upon the ground that the grant of immunity was invalid due to the lack of authorization by the United States Attorney for the Eastern District of New York. Petitioner, his attorney and the Special Attorney then appeared before Chief Judge Mishler, and petitioner's counsel argued his basis for the claim that the grant of immunity was invalid.

In an effort to resolve the problem, the Court summoned the United States Attorney for the Eastern District of New York to the courtroom. When the United States Attorney arrived, he was advised of the nature of the problem, and it soon became clear that he had no prior knowledge of the application which had been made to the Attorney General or the subsequent application which had been made to the Court. The United States Attorney was then given the opportunity to read the papers which had been presented to the Attorney General. He thereafter approved, and signed the application to the Court (Tr. 3-9, 13-14, 17, 20-23, 32-36).

his contention both in the District Court and in the Court of Appeals, that a special status had been conferred upon him (6a). Indeed, he described that status as follows: "A Special Attorney may, when specially directed by the Attorney General, conduct any kind of legal proceedings, civil or criminal, which United States Attorneys are authorized to conduct" (Brief of the Special Attorney in the Court of Appeals, at p. 4). In support of his claim that he fell within that category, he submitted his letter of appointment, dated November 30, 1972, and signed by the Assistant Attorney General in charge of the Criminal Division, Henry E. Peterson. That letter stated as follows:

> "Dear Mr. DelGrosso:
>
> "The Department is informed that there have occurred and are occurring in the Eastern District of New York and other judicial districts of the United States violations of Federal criminal statutes by persons whose identities are unknown to the Department at this time.
>
> "As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before committing Magistrates, which United States Attorneys are authorized to conduct.
>
> "Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.

"You are to serve without compensation other than the compensation you are now receiving under existing appointment.

"Please execute the required oath of office and forward a duplicate thereof to the Criminal Division." [Document filed in the Court of Appeals].

Also presented by the Special Attorney in support of his contention was his oath of office which recited that his appointment was "pursuant to the authorization of Henry E. Peterson, Assistant Attorney General, Criminal Division." [Document filed in the Court of Appeals].

REASONS FOR GRANTING THE WRIT

I.

It was the Congressional intent that United States Attorneys approve initiation of the procedures provided in 18 U.S.C. § 6003.

The opinion of the Court of Appeals very well summarizes petitioner's argument:

"Appellant's argument is bottomed on alleged defects in the procedure followed by the Government in securing the grant of immunity. He claims that 18 U.S.C. § 6003 . . . contemplates a three step method of obtaining immunity orders for grand jury witnesses: (1) application to the Attorney General, his deputy or designate; (2) approval by one of these officials; and (3) subsequent request to the court. Appellant claims that steps 1 and 3 in this procedure require the personal approval and participation of the United States Attorney for the district in which the Grand Jury is convened. It is conceded that in this case the Special Attorney—without the knowledge of the United States Attorney—procured the Department of Justice approval and

applied to the District Court to immunize DiBella. According to appellant, this rendered invalid both the order of immunity and the contempt order based upon it.

"Appellant relies heavily on the language in 18 U.S.C. § 6003(b) that *'a United States Attorney* may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an [immunity] order . . . when *in his* judgment' (emphasis added), the statutory criteria are met. The language by its terms applies only to step three in the process, the request to the District Court for an order granting immunity. But according to appellant, this manifests a Congressional desire to circumscribe immunity grants by limiting them to instances where, in the judgment of the United States Attorney, the testimony of the individual 'may be necessary to the public interest' and is not likely to be given without an immunity grant. *Id.* Therefore, appellant argues, the same restrictions that govern step three in the process must apply to the first step as well." (4a-5a) [Bracketted material and emphasis as in text of opinion]

As noted by the Court of Appeals, the statute specifically requires that the United States Attorney, himself, exercise his judgment in determining the desirability and necessity of a grant of immunity. We respectfully submit that it is the intent of the statute that the United States Attorney must first make the required determinations and must then certify those determinations to the Attorney General, and then, with the Attorney General's approval, the United States Attorney may apply to a court of proper jurisdiction for an immunity order. If it had been the intent of Congress for Assistant United States Attorneys or for so-called Special Attorneys attached to an independent or semi-independent strike force, to be empowered to make

the application to the Attorney General's office, then the statute would have so provided. Significantly, the statute only mentions the United States Attorney with regard to that phase of the process. In contrast, and indicative of the intent of Congress, Congress was careful to specify that in the next phase of the process, either the Attorney General, himself, or the Deputy Attorney General, or "any designated Assistant Attorney General" may approve the application of the United States Attorney.

The legislative history of the immunity statutes strengthens our contention in this regard. Thus, the House Report on this legislation (No. 91-1549, U.S. Cong. & Adm. News, 1970, p. 4007, *et seq.*), notes:

> "* * * With the approval of the Attorney General, Deputy Attorney General, or an Assistant Attorney General who is designated by the Attorney General, the U.S. Attorney may seek a court order. *He* must be satisfied that the testimony is indeed in the public interest and the witness must have refused or be likely to refuse to testify, claiming self-incrimination." (*Id.* at p. 4018) [Emphasis added]

18 U.S.C. § 6004 sets out the procedure to be followed for the granting of immunity to a witness during administrative hearings. The exercise of an administrative agency's discretion to confer immunity is subject to the same requirements of necessity and desirability as those imposed upon a United States Attorney, and the issuance of an immunity order is also dependent upon the Attorney General's approval. In view of the different executive makeup of administrative agencies, however, it was not practical for Congress to designate a particular individual from each agency to exercise the power as it had done in the case of the United States Attorney. Therefore, the House Report states:

> "It is anticipated that, upon enactment of the bill, the Attorney General will take such steps as are necessary to insure that appropriate procedures

are followed by each agency to designate who may issue immunity orders and in what circumstances they may be issued. It is assumed that the Attorney General will take such other steps as are necessary to insure that his office is familiar with the immunity-granting procedures of each agency, in order that issuance of such orders might be expedited and no orders will be issued without authorization." (*Id.* at p. 4018)

In view of the strong views of many that it is inappropriate to compel immunity under only a limited grant of immunity (see, for example, the dissenting views of certain Congressmen, *Id.*, at 4089), and in view of the significant consequences and burdens which are placed upon a citizen who is compelled to testify under such circumstances, one can well understand why it was not the intent of Congress to permit the initial, and probably most significant, part of the decision making process to be in the hands of an individual lower in rank and responsibility than the United States Attorney, himself.

Without doubt, the Attorney General and his designated Assistants, regularly receive a multitude of applications for authorization to invoke a variety of special procedures, including grants of immunity, wiretaps and the like. In focusing initial responsibility upon the United States Attorney, himself, Congress no doubt intended that *his* assessment of the facts and determination to proceed precede the approval of the Attorney General's office, rather than follow it.

In the present case, the problem is even more serious and apparent than would be the case if an assistant United States Attorney had been the person who exercised the decision making power. As noted by Chief Judge Mishler during the course of the argument of this issue:

"* * * This points up the difficulty we have in having two law enforcement agencies in the district,

one Strike Force and the other United States Attorney. The application made in the United States Attorney's name, that is, I don't know whether or not you're even aware of it, but it would give substance to Mr. Vitello's argument that the United States Attorney should be aware that a petition is being made, on his name, signed to the papers, not his name 'by'" (Tr. 12).

The Chief Judge reiterated the point:

"... I pointed up the problem that we have in having the Strike Force make applications in the name of the United States Attorney when the United States Attorney has no supervision or jurisdiction or very little. That's another problem. You might point that up to the Attorney General" (Tr. 21).

It is clear that in the present case, if counsel for petitioner had not voiced his objection, the United States Attorney might never have been aware, and his office's records might never have noted, that these proceedings had taken place.

The Court of Appeals indicated that it was not "sound policy for even the first step to be taken without the knowledge and concurrence of the United States Attorney" (6a). Nevertheless, upon the following rationale, it declined to accept our interpretation of the Congressional intent:

"We do not concur in this reasoning. The statute says nothing about *how* Department of Justice approval— admittedly present here—must be obtained. In the absence of specific contrary language, we see no reason why the request to the Attorney General cannot be made by an *authorized agent* other than the United States Attorney—in this instance, the Special Attorney. Congressional concern over the process would appear satisfied if, as was the case

> here, both the Attorney General or his statutory designate and the United States Attorney agree on the desirability of immunity before a Court actually grants it * * *" (5a). [Initial emphasis in original; second emphasis added]

This holding of the Court of Appeals actually begs the question. The issue is whether the so-called "Special Attorney" was an "authorized agent." Not having known about the application, the United States Attorney certainly did not authorize him to do anything. Moreover, there is not any statutory or regulatory support for the claim of authorization.

II.

The procedure followed herein was contrary to that directed by the Attorney General.

28 C.F.R. § 0.175 (set forth in full, *infra*, at 11a-12a), is the administrative order by which the Attorney General of the United States specified the procedures to be followed for compulsion of testimony under the statute here in question. It provides, in pertinent part, as follows:

> "(a) The Assistant Attorney General in charge of the Criminal Division is authorized to exercise the authority vested in the Attorney General by §§ 2514 and 6003, of Title 18, United States Code, *to approve the application of a U.S. Attorney* to a Federal court for an order compelling the testimony or the production of information before or ancillary to a court or grand jury of the United States . . . * * *" [Emphasis added]

It is respectfully submitted that, even if the statutory procedures set forth in 18 U.S.C. § 6003 do not require the request for approval to come from the United States Attorney, then 28 C.F.R. § 0.175(a) does impose such a

requirement, and, significantly, nothing in that regulation purports to confer any power upon a Special Attorney. The Attorney General's power to restrict the circumstances under which an Assistant Attorney General may approve applications is made clear by the fact that, under 18 U.S.C. § 6003(b), an Assistant Attorney General may only approve such applications when he is designated by the Attorney General to do so.

III.

Attorneys assigned to Federal Strike Forces do not have all the powers vested by law in United States Attorneys.

As noted supra, pp. 5-6, the Special Attorney herein contended in the district court and in the Court of Appeals that he possessed all of the powers vested by law in United States Attorneys as to all matters, civil and criminal. In support of that proposition, he filed with the Court his letter of appointment *by the Assistant Attorney General in charge of the Criminal Division.* That letter of appointment is reproduced *supra* at pp. 6-7. The Special Attorney contended that the Assistant Attorney General's power to make such an appointment was predicated upon the provisions of 28 U.S.C. §§ 510 and 515(a), as well as 28 C.F.R. § 0.55(g).

28 C.F.R. § 0.55(g) merely provides:

> "Subject to the general supervision and direction of the Attorney General, the following described matters are assigned to, and shall be conducted, handled, or supervised by the Assistant Attorney General in charge of the Criminal Division:
>
> * * * * *
>
> "(g) Coordination of enforcement activities directed against organized crime and racketeering."

28 U.S.C. § 510 merely provides:

> "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

Certainly, neither the quoted regulation or the quoted statute authorizes an Assistant Attorney General to appoint an attorney to a position carrying all the powers of a United States Attorney.

Likewise, reliance upon 28 U.S.C. § 515(a) is grossly misplaced. That statute provides:

> "The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General, may, *when specifically directed by the Attorney General,* conduct any kind of legal proceedings, civil or criminal including grand jury proceedings before committing Magistrates, which United States Attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought." [Emphasis added]

There is, in fact, no evidence in this case that the Attorney General of the United States specifically, or even generally, directed the Special Attorney in the instant case to do anything, or even empowered him to call himself a "Special Attorney." While it is true that the letter of appointment, annexed to the Special Attorney's brief, purports to confer the status described by 28 U.S.C. § 515(a), there is no showing that the Assistant Attorney General had the power to make such a broad grant of authority. Additionally, even if the Attorney General, himself, had appointed the Special Attorney, the broad grant of authority described in the letter of appointment appears to violate the specificity requirement of 28 U.S.C. § 515(a).

A review of the statutes and regulations reveals that the Assistant Attorney General in charge of the Criminal Division may designate attorneys, but can vest them with only very limited powers. That authority is delegated to the Assistant Attorney General by 28 C.F.R. § 0.60, which provides:

> "The Assistant Attorney General in charge of the Criminal Division is authorized to designate attorneys to *present evidence to Grand Juries* in all cases assigned to, conducted, handled, or supervised by the Assistant Attorney General in charge of the Criminal Division." [Emphasis added]

That grant of authority does not, in any way, make an attorney so designated to be the equivalent of a United States Attorney, as contended by the Strike Force Attorneys, and it makes no mention of any power to make or initiate applications for grants of immunity without the approval and supervision of the United States Attorney.*

IV.

A prior decision of this Court supports petitioner's contentions.

In *United States* v. *Giordano*, — U.S. —, 94 S.Ct. 1820 (1974), this Court was called upon to construe similar authorization procedures specified in Title III of the Omnibus

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* At fn. 4 of the Court of Appeals opinion (6a), the Court states: "We were told at oral argument that the failure of communication here was due to recent changes in top personnel in the Strike Force and the United States Attorney's office." At best, that claim by government counsel was speculative and was unsupported by anything in the record. It contrasts sharply with the assertion of the Strike Force attorneys on this appeal that each of them, subordinates and superiors, are vested with all the powers of *the* United States Attorney. That is the rationale upon which they operate, and many such operations do not come to public view.

Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520—the wiretap authorization statutes. 18 U.S.C. § 2516(1) provided that "the Attorney General or any Assistant Attorney General specially designated by the Attorney General, may authorize" an application for intercept authority. In *Giordano,* an executive assistant to the Attorney General, not specially designated by him, had authorized an application for wiretap authority. Just as we argue here, this Court said in *Giordano,* "plainly enough, the executive assistant is neither the Attorney General nor a special designated assistant Attorney General; * * *" (94 S.Ct. at 1825). Although this Court found that ". . . . precise language forbidding delegation was not employed in the legislation before us;" it concluded that "Section 2516 (1), fairly read, was intended to limit the power to authorize wire applications to the Attorney General himself and to any Assistant Attorney General he might designate. This interpretation of the statute is also strongly supported by its purpose and legislative history."

Similarly, in *Giordano,* this Court noted that:

> "The act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigations. Rather, the applicant must state and the Court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too

> dangerous, § 2518(1)(c) & (3)(c). The act plainly calls for the prior, informed judgment of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a Judge for authority to wiretap or eavesdrop. *The mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order.*" [Emphasis added] (94 S.Ct. 1826-7)

We respectfully submit that the Congressional intent was the same with regard to the immunity statute and that the principal decision making authority was placed in the United States Attorney, himself. It is upon his representations that Congress assumed that the designated officials in the Department of Justice would rely, and it was upon the combined judgment and representations of these prosecutorial officials that Congress presumed a Judge would rely in issuing the requested order. Since the United States Attorney, in the present case, played no role whatsoever in the presentation of the application to the Attorney General's office, we respectfully submit that the statute has been violated, as have the regulations of the Department of Justice, and the purported grant of immunity is, therefore, void. For that reason, the witness was justified in not testifying, and the judgment of contempt should be vacated.

CONCLUSION

For all of the above reasons, the writ of certiorari should be granted and the judgment of contempt should be reversed.

Respectfully submitted,

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July, 1974